136.

THE ONTARIO HUMAN RIGHTS CODE

R.S.O. 1970, c. 318, as amended

IN THE MATTER OF: the Complaint of Mr. Ronald O'Brien of Toronto, Ontario, that he was discriminated against by reason of refusal to employ because of his age, by Ontario Hydro, contrary to paragraph 4(1)(b) of the Ontario Human Rights Code, as amended.

APPEARANCES: Messrs. Steven J. McCormack and Brock Myles, Counsel for the Ontario Human Rights Commission and Mr. Ronald O'Brien.

Mr. Bruce H. Stewart, Q.C., Counsel for Ontario Hydro.

A HEARING BEFORE: Peter A. Cumming, a Board of Inquiry in the above matter appointed by the Minister of Labour, the Honourable Robert Elgie, June 4, 1980, to hear and decide the Complaint.

DECISION AND ORDER

Introduction

This Board of Inquiry (Exhibit No. 1) involved the consideration of a Complaint (Exhibit No. 2) by Ronald O'Brien of Toronto, in which he alleges discrimination by Ontario Hydro. Specifically, Mr. O'Brien alleges he was discriminated against contrary to Section 4 (1)(b) of the Ontario Human Rights Code, 1970, R.S.O., c. 318 (hereinafter referred to as the "Code"), which reads:

> s.4-(1) No person shall,
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> (b) dismiss or refuse to employ or to continue to employ any person;
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> because of ... age... of such person or employee.

As well, Section 4 (6) of the Code should be noted:

> (6) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age do not apply where age is a bona fide occupational qualification and requirement for the position for employment. 1974, c. 73, s. 2.

Mr. O'Brien alleges that Hydro refused to hire him as an apprentice electrician because of his age, he being 40 at the time of his seeking employment.

I shall review the applicable law to the topic of age discrimination and then the evidence.

The Law Concerning Discrimination on the Basis of Age

The Statutes

All of the Canadian provinces, as well as the federal government, have now enacted, under various titles, statutes which aim at the protection of human rights within each of those respective jurisdictions. The type of protection provided under these statutes varies somewhat with each enacting legislature. As such, the protection from discrimination on the basis of age receives some diversity of treatment across Canada. For example, "age" may be included as one of the grounds of proscribed discrimination along with

various combinations of race, colour, sex, religion, marital status, ancestry, political belief, place of origin, etc., as in the British Columbia Human Rights Code R.S.B.C. 1979, C. 186, s. 8. Conversely, "age" may be treated separately, (as in the Newfoundland Human Rights Code R.S.N. 1970, C. 262 as am. by 1974 S.N. 114, s. 9(1)(b)), or along with "Physical handicap", (in the P.E.I. Human Rights Act, S.P.E.I. 1975, c. 72 11(1)). Québec's approach is distinctive in that it makes no specific reference to any proscribed grounds of discrimination, reference being made to "discrimination" in the generality. (s. 16).

For the most part, though, the structure of the various provisions dealing with age discrimination in all eleven Canadian statutes is rather similar. "Age" is on the one hand, a specifically prohibited ground of discrimination, (except in the case of Québec, as noted above), yet, on the other hand, may be a permissible ground of discrimination under certain circumstances. Discrimination on the basis of age in employment circumstances is permitted, in general, where a reasonable, or bona fide occupational qualification requires that an arbitrary distinction is made between employees, or applicants for employment. Such an exception clause is present in the federal, and in all of the provincial human rights statutes (except that of Nova Scotia: Human Rights Act, C.S.N.S. 1979, c. H-24).

Another exception to the proscription against discrimination on the basis of age, is where bona fide retirement, pension, or insurance plans make a distinction on the basis of age between persons covered by them. The following subsection of the B.C. Human Rights Code is typical of the exception

clauses found in other codes:

> s. 9(3) Nothing in this section relating to age prohibits the operation of a term of a bona fide retirement, superannuation or pension plan, or the terms of conditions of a bona fide group or employee insurance plan, or of a bona fide scheme based on seniority.

Thus, the regime for dealing with age discrimination in Canada is rather consistent across the provinces. The prohibition against age discrimination is, in general, coupled with exceptions where a bona fide occupational qualification exists, or a bona fide retirement or pension plan has been established. Ontario, while specifically referring to many conditions of employment in which discrimination is proscribed, has structured its provisions in the Ontario Human Rights Code, R.S.O. 1970, c. 318 as am., as follows:

> s. 4.-(1) No person shall,
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> (b) dismiss or refuse to employ or to continue to employ any person;
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> (g) discriminate against any employee with regard to any term or condition of employment,
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> because of age of such person or employee.
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> (6) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age...do not apply where age...is a bona fide occupational qualification and requirement for the position of employment.
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> (9) Clause (g) of subsection 1 does not apply to any bona fide superannuation or pension fund or plan or any bona fide insurance plan that provides life, income, disability, sickness, medical or hospital payments or benefits of a monetary kind to which an employee, his survivors or dependants are or may be entitled that differentiates or makes a distinction, exclusion or preference between employees or any class or classes of employees because of age... (R.S.O. 1970, c. 318, as am. by 1974, c. 73, s.2).

The United States has enacted a federal statute specifically aimed at the prohibition of discrimination on the basis of age: The Age Discrimination in Employment Act of 1967, 29 U.S.C.A. s. 621 et seq. The structure of its provisions dealing with age discrimination in conditions of employment and the coincident exceptions, parallels that of the Canadian statutes. It provides that:

> s. 623 (a) It shall be unlawful for an employer -
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> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
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> ...
> (f) It shall not be unlawful for an employer, employment agency, or labor organization -
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> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
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> (2) to observe the terms of a bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or
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> (3) to discharge or otherwise discipline an individual for good cause.

In the United Kingdom, there exists no general statute that deals with human rights. Traditionally, Bills of Rights have been thought to offend the principle of parliamentary supremacy, being perceived as fostering a measure of judicial activism to render validly enacted legislation inoperative. Britain has enacted statutes, however, which offer protection from discrimination on the basis of race and sex. (The Race Relations Act, 1976, c. 74:

The Sex Discrimination Act, 1975, c. 65). No such statute prohibits age discrimination.

Some protection is provided to employees under the Trade Union and Labour Relations Act 1974 c. 52, where an employee may bring an action against an employer for wrongful dismissal, if the dismissal is not justified as being related to the work, to the employee's conduct, to employee redundancy, or any other substantial reason (Schedule 1, Part II, s. 6). An employee may not bring an action though, once he or she has reached "normal retirement age", (Nelson and Woolett v. Post Office [1978] IRLR 548). There appear to be no cases involving wrongful dismissal when the reason was the employee's age.

Other rights are now guaranteed in Britain by virtue of her ratification of the European Convention on Human Rights. According to the Convention, the European Commission may hear individual petitions from citizens of signatory states with respect to violations of human rights in their home state. However, the Convention seeks to guarantee legal and political rights on a non-discriminatory basis, not non-discrimination rights as they pertain to the provision of services or conditions of employment. Further, "age" is not a ground of discrimination recognized in the Convention as giving rise to a complaint.

Having examined the structures of the various statutes which offer recourse to victims of discrimination on the basis of age, it remains to outline the definitions of "age" used in those statutes. Obviously, the manner in which age is defined will be an indication of the policy considerations which are thought to be desirable by the enacting legislature. In

discussing the Ontario Human Rights Code with respect to age discrimination, the Board of Inquiry in Hall v. IAFF and Etobicoke Fire Dept. July 21, 1977, stated as follows:

> "One of the objectives of the Code is to ensure that people in the age range forty to sixty-four, who in the past often have been discriminated against in respect of employment opportunities, are not prevented from working simply because they are believed to be too old. If they are to be prevented from filling available jobs it must be because they have shortcomings apart from age." (at p. 5).

In defining "age" in s. 19(a) of the Ontario Human Rights Code (RSO. 1970, 1. 318, as am. by 1972, c. 119) as "any age of forty years or more and less than sixty-five years", the intent was to protect employees in that particularly vulnerable age group from being denied employment opportunities or being arbitrarily dismissed.

Other codes with similar definitions of "age", and so presumably the same objectives, are: Alberta, Individual Rights Protection Act S.A. 1972, c.2, s. 28(a), (45 to 65 years); Nova Scotia, Human Rights Act C.S.N.S. 1979, H-24, s. 11B(1), (40 to 65 years); British Columbia, Human Rights Code R.S.B.C. 1979, c. 186, s. 1, (45 to 65 years). The definition in the B.C. Code, though, was previously deemed not to be exhaustive, since it had stated that the definition was to apply ..."unless the context otherwise requires..." (S.B.C. 1973 (2nd session) c. 119, s. 1). The Code was held to apply where there was discrimination against a 31-year-old complainant: Burns v. Piping Industry Apprentice Board, (Apr. 1977.) [The Code is now amended to the extent that the clause "unless the context otherwise requires" has been removed.]

Other statutes define "age" more broadly. Presumably the intention was to create a sweeping ground of discrimination, rather than to protect a particularly disadvantaged age bracket. Those statutes define "age as follows: Newfoundland, Human Rights Code R.S.N. 1970, c. 262, s. 9 (1)(b), (19 to 65 years.); Prince Edward Island, Human Rights Act s.P.E.I. 1975, c. 72, s. 11 (1)(a), (18 to 65 years); Saskatchewan, Saskatchewan Human Rights Code s.s. 1979, C.S-24-1, s. 2 (a), (18 to 65 years). The New Brunswick Human Rights Act R.S.N.B. 1973, c. H-11 15.2, as am, defines "age" as over 19 years, but has no upper limit. Both the Quebec Charter of Human Rights and Freedoms R.S.Q. 1977, C-12, and the Manitoba Human Rights Act S.M. 1974, C. 65 have no definition of age at all. It is interesting to note that both the Manitoba and New Brunswick Acts have been used to find discrimination on the basis of age where an employee was forced to retire at age 65: Peter Derksen v. Flyer Industries Ltd. (June 2, 1977); Charles Little v. St. John Shipbuilding and Drydock, Jan. 15/80)

The Canadian Human Rights Act R.S.C. 1976-77 c. 33 does not define "age" specifically, but in s. 14 provides that:

> s. 14 It is not a discriminatory practice if
> ...
> (c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual;[1]

In the United States, The Age Discrimination in Employment Act, 29 U.S.C.A. s. 621 et seq., s. 631 defines "age" as "at least forty years of age, but less than sixty-five years of age". As will be seen below in the cases, the purpose of the U.S. statute was to provide protection for persons in that age group.

Aside from the fact that the various Acts aim at different age groups

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1. In Edward White v. Minister of Public Works Canada (July 9, 1980), the complainant alleged discrimination on the basis of age contrary to s. 7(b) of the Canadian Human Rights Act, S.C. 1976-77, c. 33. Mr. White was retired at age 65 after a little more than three years employment in the ministry. It was his contention that mandatory retirement age ought to be treated the same as a lay-off such that he would be entitled to severance pay.

   Under the Collective Agreement in force, laid-off employees were entitled to severance pay, as were employees that qualified for a pension. To be qualified for a pension, an employee had to have completed at least five years of pensionable service. Thus, Mr. White was not entitled to severance pay since he was retired, not laid-off, and had only completed just over three years of pensionable service.

   Mr. William Tetley Q.C., Chairman of the Tribunal, dismissed the claim. He stated that the complainant had not been discriminated against on the basis of age, since the retirement itself was not discriminatory (s. 14(b) and (c) of the Act), and lack of entitlement for severance pay was a question not of age, but of length of service.

in their prohibition of age discrimination, the fact remains that both the Canadian and U.S. statutes structure their provisions in a similar fashion. As would be expected then, the cases which turn on the interpretation of those provisions can be classified into two groups:

(1) those that deal with findings of age discrimination;

(2) those that decide whether a bona fide occupational qualification, or retirement or pension plan exists.

The cases will be divided into these two groups for the purpose of outlining the Canadian and U.S. case law.

The Cases

Findings of Discrimination

In arriving at a determination of whether or not discrimination on the basis of age has taken place, a Board of Inquiry must make a finding of fact as to whether the age of a complainant formed the basis of a respondent's decision to deny services or refuse employment to the complainant. A difficulty arises when there exists more than one reason for refusal to employ, or for dismissing a complainant. Must the age of the complainant be the sole reason, or need it merely be one of the reasons?

When the only reason for dismissing an employee is his or her age, then the procedure of a Board of Inquiry is quite straightforward. For example, in the case of a lathe operator with a satisfactory work record, who was dismissed when he turned 65, the Board of Adjudication found that the:

> "only reason that Mr. Derkson was retired from his employment ... was that he had reached the age of 65." Peter Derkson v. Flyer Industries Ltd. June, 1977, (Manitoba), p. 35.

Since in the Manitoba Human Rights Act there is no upper age limit for consideration of age discrimination, the Board (Professor Jack R. London) found that indeed the respondent had discriminated against the complainant within the provisions of the Act. Having so found:

> "The onus then shifts ... to the employer to demonstrate, if it can, that there has been no contravention of the Human Rights Act because of one of the exceptional defences provided in the Act." (p. 37).

A similar finding was made in a B.C. case (Burns v. Piping Industry Apprenticeship Board, April, 1977), where an applicant was turned down for training as an apprentice plumber. The applicant was 31 years old, whereas the standards of the P.I.A.B. required that applicants be between the ages of 18 and 25. After weighing the validity of other possible grounds for not considering the application of Burns, the Board of Inquiry stated:

> "...[W]e have come to the conclusion that the predominant reason for the denial to the complainant of his application to be registered with the P.I.A.B. was that he was not between the ages of 18 and 25 as required in the standards ..." (p. 6).[1]

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1. Having found that the complainant was discriminated against on the basis of age, the Board denied the claim on other grounds; affirmed on appeal to B.C. Supreme Court: [1978] 2 WWR. 22.

Thus, Boards have encountered no difficulty when age is the "only" or the "predominant" ground for distinguishing complainants,[2] but the problem is compounded when other possible grounds are also present.

In the case of Britnell v. Brent Personnel (june 1968, Ontario), a woman was found to have been denied employment as an executive secretary because she was not as young as the employer would have liked. There, in filtering through the various reasons given by the respondent for not considering the complainant's application, Professor W.S. Tarnopolsky found that the "correct reason" for the denial was the complainant's age (p. 11). He goes on at p. 15:

> ..."[T]he Act [Age Discrimination Act R.S.O. 1970, c. 7], in any case, makes my determination easier because it does not include any qualifications on the prohibition of discrimination because of age. Section 5(1) does not say 'solely because of age', nor 'age exclusively'. The term 'age' is qualified only in section 1(a) as being 'any age of forty years or more and less than sixty-five years'."[3]

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2. Conversely, when "age" is not truly a ground for dismissal, as determined by the evidence, then there is not, of course, discrimination under human rights legislation. An example is the recent Ontario case, Mary Peterson and Grace Carter v. Canadian Rubber Dealers (November 19, 1980). The Complainants alleged that they had been dismissed because of their ages. Mrs. Peterson did not pursue her claim at the hearing.

   The Board of Inquiry (Professor Ian Hunter) found that the respondents had not dismissed Mrs. Carter as a waitress because of her age. Indeed, she had only recently been hired, with the respondent's knowledge that she was 52 years old. The Board stated that technically the complainant had not been "dismissed" contrary to s. 4(1)(b) of the Ontario Human Rights Code since she had been offered alternative employment in the company and had turned the offer down. Further the Board found that age was not a consideration in the action that the respondents took with respect to Mrs. Carter. Rather, she was treated as she was because of the complaints of customers about her arguments with Mrs. Peterson, and the speed at which she carried out her waitressing duties.

3. The Age Discrimination Act has now been repealed, being incorporated into the Ontario Human Rights Code 1972, c. 119, s. 15].

Professor Tarnopolsky's interpretation would seem to indicate that any finding that "age" figured in the treatment of a complainant would give rise to a valid claim of discrimination. Although this decision has not explicitly been followed, some recent decisions have adopted a similar approach.

In a B.C. case, a 56 year old woman was dismissed from a graphic arts course given by the Vancouver Vocational Institute. (Carol Joy Felstad Wilson v. Vancouver Vocational Institute, (June 4, 1976)). The woman had completed the first two sections of the course and was denied the chance to go on. The reasons for the denial given by the V.V.I. included: lack of practical skill; other students had complained about Ms. Wilson's behaviour in the classroom; and that she was a safety hazard. The Board of Inquiry found that the complainant was not given an adequate opportunity to become proficient in the skills required, and as such, the reasons for her termination did not amount to reasonable cause under s. 3(1) of the B.C. Human Rights Code. The Board, per Carolyn Gibbons stated:

> "Where there is a denial of such a service or facility and the reasons advanced are unsubstantial, an inference may be drawn when the elements of age and sex are present, that discrimination has occurred." (p. 4)

And further:

> "Where an assessment is subjective and elements like age or sex play some part, a prima facie case is established where as a result of that assessment there has been a denial of a service or facility." (p. 4).

Here, the board merely required that the factor of age (or sex) "played some part" in the denial of services to the complainant, for the claim to be valid. It must be noted though that the decision of the Board was not clear

as to whether or not "age" or "sex" was the ground on which the complainant was discriminated against. It was considering s. 3(1) of the B.C. Code which provides:

> s. 3(1) No person shall
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> (a) deny to any person or class of persons any accommodation, service or facility customarily available to the public, or
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> (b) discriminate against any person or class of persons with respect to any accommodation, service, or facility customarily available to the public,
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> unless reasonable cause exists for such denial or discrimination.

Having determined that the causes advanced by the V.V.I. were not reasonable, the Board did not proceed to decide what the causes actually were.

In a case involving a refusal to hire a 51-year-old woman, an Ontario Board of Inquiry (Professor D.A. Soberman) decided the issue in a similar fashion. (Hawkes v. Browns Ornamental Iron Works, December 12, 1977). Here, Mrs. Hawkes had undertaken to learn the welding trade in order to improve her job prospects. The respondents agreed to hire her, and then changed their minds. The Board found that the subsequent decision was based on the Browns' belief that Mrs. Hawkes was too old to fulfill the job requirements:

> ..."Mrs. Brown believed that Mrs. Hawkes could not do the job not because of any evidence of bad health or insufficient weight or stature, but because of Mrs. Hawkes' age and an unsupported assumption about her lack of experience with heavy physical work. In my opinion, therefore, Mrs. Hawkes' age was a material consideration in Mrs. Brown's conduct." (p. 13).

Given that "age" was a "material consideration", Professor Soberman considered whether this amounted to discrimination under s. 3(1)(b) of the Code. He set forth the issue as follows:

> "If Mrs. Hawkes' age were the sole or dominant reason for the Brown's conduct there would be a violation of s. 4(1)(b) of the Ontario Human Rights Code. On the other hand, it is not a violation of the Code to refuse to hire a job applicant because of a mistaken belief in the physical capacity of the applicant in question. What is the effect of a refusal to hire when the reasons are in part outside the Code and in part a violation of it?" (p. 15).

In answering that question, Professor Soberman made an analogy with the treatment of s. 110(3) of the Canada Labour Code R.S.C. 1970, c. L-1 in the case of R. v. Bushnell Communications Ltd. et al (1973) 1 O.R. (2d) 442. In that case an employee, a member of a trade union, was dismissed by the defendant. Considering whether the employee was dismissed because of his membership in a union, Hughes, J. stated at p. 447:

> "If membership in a trade union was present in the mind of the employer in his decision to dismiss, either as the main reason or incidental to it, or as one of many reasons regardless of priority, s. 110(3) of the Canada Labour Code has been transgressed."

Bushnell has been cited with approval in other labour decisions, for example, Re Sheehan and Upper Lakes Shipping Ltd. 81 D.L.R. (3d) 208; Pipher v. Atlantic Bus Lines Inc. [1980] O.L.R.B. Rep. 154. Professor Soberman reasoned:

> "It follows that if age was present in the mind of Mrs. Brown in her refusal to employ Mrs. Hawkes, there has been a violation of the Ontario Human Rights Code, s. 4(1)(b), regardless of the fact that other reasons may also have been present." (p. 16).

That reasoning has been adopted, citing Bushnell as authority, in several subsequent decisions of the Ontario Human Rights Commission. In Sheila Robertson v. Metropolitan Investigation Security Ltd. (August 10, 1979), and in Pearlina Reid v. Traecey and Russelsteel Limited (May 19, 1981), I cited with approval Professor Soberman's discussion of the Bushnell decision in Hawkes v. Brown. Similarly, in Jamie Bone v. Hamilton Tigercats (August 16, 1979), Professor John McCamus cited both Bushnell and Re Sheehan and Upper Lakes Shipping Ltd., supra, in deciding that where prohibited grounds are "motivating factors", then a violation of the Code has occurred, even though a number of other factors were also present.

In two more recent decisions, Professor Soberman has cited Bushnell as the "leading decision" on the issue of Code violations in the presence of factors not covered by the Code: Skeete and Samuel v. Jolyn Jewellry Ltd. (June 23, 1980); Hetty Hendry v. L.C.B.O. (August 5, 1980).

In summary, then, Bushnell holds that where one prohibited ground is present, even amongst other non-prohibited grounds, a violation has occurred. This has been approved in other labour relations decisions, and has been applied by analogy in decisions of Boards of Inquiry under the Ontario Human Rights Code.

A recent Alberta case has also followed this approach: Mary Godowsky v. The School Committee of the County of Two Hills No. 21, August 14, 1979. In this case, the complainant was forced to retire at age 62 rather than accept an unreasonable change in her teaching position. To establish that

Mrs. Gadowsky had been a victim of age discrimination,

> "... the Board must be satisfied that she was faced with an adverse change in her status and that a factor influencing the change in status was her age." (p. 8).

In weighing the factors that figured in the School Committee's decision, the Board referred with approval to a summary of the law in an article by Professor Ian Hunter: 'Human Rights Legislation in Canada: Its Origin, Development and Interpretation' (1976), 15 U.W.O. L. Rev. 21 at p. 32:

> "... Canadian boards of inquiry have consistently held that it is sufficient if the prohibited ground of discrimination was present to the mind of the respondent, however minor a part it may have played in the eventual decision."

The Board accepted that view of the law, and went further to consider whether the School Committee had acted in good faith in its treatment of Mrs. Gadowsky:

> "Clearly, if a prohibited consideration under the Individual Rights Protection Act intruded into the process, then it was not ... [acting in good faith]". (p. 10).[1]

Indeed, if one were to summarize the Canadian decisions on age discrimination, it could be fairly said that if a board of inquiry finds that a respondent allowed a complainant's age to influence whatsoever his or her treatment of the complainant, notwithstanding any other factors, then discrimination has, in fact, occurred; this being subject only to the

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1. An appeal by the School Committee to the Alberta Court of Queen's Bench is pending.

excepted situations covered by, and the definition of "age" contained in, the applicable statute.

A brief survey of cases in the United States show that a similar approach has been adopted there. The general purpose of the Age Discrimination in Employment Act of 1967, s. 2 et seq., as amended by 29 USCA, s. 621 et seq., was stated by Guin, J. in Polstorff v. Fletcher (1978) 452 F. Supp. 17, at 23:

> "The Age Discrimination in Employment Act (ADEA) provides protection for persons between the ages of 40 and 65. The purpose of the ADEA was to alleviate serious economic and psychological suffering of persons within this age range, caused by unreasonable prejudice and job discrimination."

On the other hand, the Act was not meant to intrude into reasonable employer practices:

> "In short, the Act is designed only to attack those employers' personnel policies and practices which arbitrarily classify employees or potential employees on the basis of age. It does not seek to affect employer decisions based on individual assessments of a person'a abilities, capabilities, or potential." (per: Robson, J. in Magruder v. Selling Areas Marketing, Inc. (1977) 439 F. Supp. 1155, at 1164.)

Given that the purpose of the ADEA is to encourage assessments on merit rather than on age, the interpretation of what constitutes discrimination should be consistent with that purpose. In a case involving the Maine Human Rights Act 5 M.R.S.A. ss 457-72 (1979), McKusick, C.J. stated:

> "The purpose of the ... ban on age discrimination is to assure that performance, not age, will determine an employee's marketability and job security.
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> That purpose would be undermined, if, in order to recover ..., an employee had to establish that age was the sole, rather than a substantial factor motivating his discharge.

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> Accordingly, we hold that in an age discrimination case..., even if more than one factor affects the decision to dismiss an employee, the employee may recover if one factor is his age and in fact it made a difference in determining whether he was to be retained or discharged." (Wells v. Franklin Broadcasting Me., 403A 2d771 at 773.)

The leading U.S. case which arrives at that same conclusion is Langesen v. The Anaconda Company 510 F. 2d 307 (1975), a decision of the U.S. Court of Appeal. The appeal was made by the complainant from a jury trial in which the judge had instructed that age must be the "sole" reason for the complainant's discharge. In reversing the District Court decision, Engel, J. held:

> "However expressed, we believe it was essential for the jury to understand from the instructions that there could be more than one factor in the decision to discharge him and that he was nevertheless entitled to recover if one such factor was his age and if in fact it made a difference in determining whether he was to be retained or discharged. (at p. 317).

This decision has been followed in two more recent decisions: Carpenter v. Continental Trailways 446 F. Supp. 70 (1978) and, Cunningham v. Central Beverage Inc. 480 F. Supp. 59 (1980). In the Carpenter case, it was found that "age" was "one factor" considered by the employer in dismissing the employee, and so the ADEA had been violated. Likewise, in the Cunningham case, "age" was one of the determining factors" in forming the employer's decision to dismiss the complainant.

Thus, the approach in the U.S. has been similar to that in Canadian cases.[1] To require that age be merely one of a number of factors influencing

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1. However, the U.S. cases perhaps adopt a more systematic approach to what constitutes a prima facie case. See: Lock v. Textron (1979) F. 2d 1003.

an employer's treatment of an employee for a claim of age discrimination to be valid, seems to be no different than requiring that age "play some part" (Wilson: supra), be "present in the mind" of the employer (Hawkes: supra), or have "intruded into the process" (Gadowsky; supra), as Canadian Boards of Inquiry have decided. Such an approach is consistent with the principle that humanitarian remedial statutes ought to be interpreted liberally, and in the spirit of the intended public good.[2]

The essential issue, in considering the evidence in an Inquiry such as this, is to determine whether 'age' is or is not an operative factor by itself in the refusal to employ. That is, is the criterion of 'age' present as an arbitrary basis for the refusal to employ. If it is, then there will be discrimination on a prohibited ground within the meaning of the Code, unless 'age' is a "bona fide occupational qualification and requirement for the position of employment." (s. 4(6) of the Code). Let us now consider the exceptional circumstances.

The Exceptions

In situations where "age", as a prohibited ground of discrimination is considered, there are exceptional circumstances where distinctions on that basis are permissible. Therefore, it may be lawful in some circumstances for employers to recognize age as a factor affecting an employee's capacity, and act accordingly. For this reason, most of the Canadian human rights statutes permit age discrimination when it is founded on a "bona fide occupational qualification", or where "reasonable cause" exists, (Nova Scotia being the only exception). Likewise, age discrimination is permitted if it

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2. See, for example, The Interpretation Act, R.S.O. 1970, c. 225, s.10.

is carried out pursuant to a "bona fide retirement or pension plan". This provision exists in all of the relevant Canadian statutes.

As could be expected, given these exceptions, many of the Canadian cases involve a determination of what is meant by "bona fide" or "reasonable". In the Manitoba case of Peter Derkson v. Flyer Industries, Inc. (June 2, 1977), the Board of inquiry had to consider whether a "reasonable occupational qualification" or a "bona fide retirement plan" existed to defeat the prima facie case put forward by the complainant (per: s. 6(6) and s. 7(2) of the Human Rights Act S.M. 1974, c. 65).

Professor London considered these exceptions:

> "The exception to the prohibition against discrimination on the basis of age which is contained in the words 'reasonable occupational qualification and requirement for the position or employment' can only refer to two circumstances. The first is that case where the individual by virtue of his age alone does not have the physical, mental or technical capacity to carry out his duties as an employee. It would be incumbent upon an employer who sought to set up this exception as a defence to demonstrate by convincing evidence that one can infer in the particular circumstances that age alone would render an employee physically, mentally or technically incapable of performing his duties. The second case ... would be where it can be shown that the public or other persons might be adversely affected or harmed because the very age of the employee might make it obvious he could not as safely perform his duties as would someone younger in age ... Once again, however, substantial evidence would have to be adduced by the employer to demonstrate the incapacity or reduced capacity occasioned by the age of the employee. (p. 38).
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> ...
>
> ... I find it difficult to interpret the words of subsection (2) of section 7 so as to reach the conclusion that the establishing of a mandatory retirement age, with or without economic benefit at that time, constitutes a permissible term of a 'bona fide retirement' plan. The fact that the words 'bona fide retirement' are lumped together with the words 'superannuation or pension' preceding the word 'plan' indicates to me that the type of plan envisaged in the section is one that provides economic benefits for an employee once he or

> she reaches a certain age, whether or not employment ends, or once he or she has left the employment of the company either voluntarily or for cause. Moreover, the word used is 'plan' not 'policy'. In short, I do not think that the mere setting of a retirement age constitutes a term of the type of plan envisaged in that subsection. The purpose of the subsection is simply to ensure that given a proper plan there may be distinctions or differentials in benefits which depend on age. If that were not the case the actuarial basis of such plans might be seriously affected and improper benefits might be provided. (p. 44).

Thus, Professor London's interpretation of the exceptions is that a "reasonable occupational qualification" requires that evidence be adduced to show impaired capacity of the employee or safety risks which are age-related, and that a "bona fide retirement plan" requires the existence of a regime of employee benefits, not merely a mandatory retirement policy at a fixed age. He found neither of these to be present in the Derkson case.

In a recent New Brunswick case, the definition of a "bona fide occupational qualification" was discussed at length. (Charles Little v. St. John Shipbuilding and Drydock Co. Ltd. January 10, 1980). In particular, the Board of Inquiry considered how the nature of the evidence available might influence the bona fides of an occupational qualification.

> "...[I]f medical tests are available to accurately measure one's biological or functional age, then such tests can eliminate the need to discriminate on the basis of chronological age.
>
> If medical tests are not available then there is a greater possibility of a bona fide occupational qualification being necessary.
>
> ...
>
> Where medical tests are not practical for whatever reason and statistical data is available to show that there is a reasonable probability of individuals beyond a certain age having difficulty in meeting the minimally acceptable

> performance standards for a particular job, it can be logically argued that a bona fide occupational qualification ought to exist - that discrimination on the basis of chronological age is necessary." (p. 14).

From these two cases, a framework for dealing with the assessment of a "reasonable" or "bona fide" occupational qualification seems to emerge. On the one hand, according to the decision in Derkson, the exception may either pertain to the reduced capacity of the individual to carry out his or her duties, or to the safety of the individual or others as a result of some age-related impairment. This distinction was also recognized in the Little case, and in fact, the Board there stated:

> "... [I]n situations where public safety is a major factor, the burden of showing the existence of a reasonable occupational qualification should be less onerous than what otherwise might be the case." (p. 22).

In other words, age discrimination is permissible where there is potential risk to public safety (or to the individual himself or his colleagues) if age limitations were removed.

On the other hand, the nature of the available evidence may influence the toleration of age discrimination. In the Little case, the Board felt that where medical evidence of incapacity is difficult, or impossible to adduce, the bona fides of an occupational qualification should be recognized, so long as there is a "reasonable probability" that incapacity may ensue at a particular age.

Thus, the type of job and the evidence of age related capacity are the two important considerations in assessing the validity of an occupational qualification. These factors have been weighed in a series of Ontario cases.

The first of these involved the forced retirement of a fire-prevention officer at age 60 (Re Ontario Human Rights Commission and the City of North Bay (1977) 17 O.R. (2d) 712 (Ont. C.A.). The nature of the complainant's job was potentially hazardous and stressful as he was required to examine buildings after they had burned down. No medical evidence was brought forward to suggest that the capacity of the complainant was not a match for the demands of the position, but the evidence of four experienced firemen was heard:

> ..."(T)hey felt that age 60 was an appropriate 'round-off' figure to define the safe limites of employment in the interests of the individual himself and of his fellow workers."[1]
>
> In defining what is meant by "bona fide" Professor Mackay stated:
>
> "...(A)lthough it is essential that a limitation be enacted or imposed honestly or with sincere intentions it must in addition be supported in fact and reason 'based on the practical reality of the work-a-day world and of life".
>
> In my view the age 60 mandatory retirement provision.... satisfies both aspects of the word "Bona fide'. It is a condition honestly imposed and, on the basis of the evidence of the Corporation's witnesses, which I accept, it is a condition which reasonably and properly can be imposed in the special context of firefighters. Firefighters (along with policemen) belong to one of the mose hazardous occupations in Ontario...". (p. 13).

Professor Mackay considered the nature of the job and the evidence brought forward. He also required that if the qualification is to be "bona fide" it must be "imposed honestly or with sincere intentions". If the condition were imposed with a view to escaping the provisions of the Ontario Human Rights Code, it could not be said to be bona fide.

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1. From the decision of the Board of Inquiry (R.S. Mackay Q.C.): Jay Cosgrove v. City of North Bay May 21, 1976, at p. 8 (Decision affirmed at Divisional Court: September 12, 1977 and at Ont. C.A.: supra).

In another decision, Thomas Hadley v. City of Mississauga, May 21, 1976, handed down the same day as the Board's decision in North Bay, the same issues were dealt with. Once again, the complainant was a fireman who was forced to retire at age 60. The Board (Professor S.N. Lederman) held though, that in the absence of any evidence brought forward by the City that firemen deteriorated past age 60 to the extent that some safety risk was inevitable, the complainant's claim was valid.

Professor Lederman referred to a U.S. decision (Hodgson v. Greyhound Bus Lines Inc. (1974) 499 F. 2d 859.) where it was held that the employer, to discharge its burden of proof, must at least show that a "minimal increase in risk of harm" (p. 7) would result if employees were allowed to work past a fixed age. Here, the employer brought no such evidence forward. As such:

> "Consequently the Board has no concrete evidence before it to suggest that age is a bona fide occupational qualification and requirement of shift captain." (p. 11).

A further decision of an Ontario Board of Inquiry dealt with precisely the same issues. (Hall and Gray v. IAFF and Etobicoke Fire Dept. July 21, 1977). In that case, the Board (Professor Bruce Dunlop) followed the Hadley decision, finding that where there was no evidence to show that firefighters over age 60 were less effective and less safe than younger employees, a bona

fide occupational qualification was not established. The Board had heard some "impressionistic" evidence from the deputy chief of the Etobicoke Fire Dept., that indicated that some firefighters were less capable of responding to the demands of the job after age 60. Professor Dunlop felt, though, that this evidence went to show that firefighters ought to be allowed to retire at age 60, but should not be required to. Some "scientific or statistical data" would be necessary before the Board could recognize that the age limitation was a bona fide occupational qualification.

This decision was overturned by the Ontario Divisional Court (Borough of Etobicoke v. Hall et al. (1980), 26 O.R. (2d) 308.) Speaking for the court, O'Leary,J. disagreed with the Board of Inquiry's definition of "bona fide":

> "...[I]n requiring a scientific conclusion that there was a significant increase in the risk to individual firefighters, their colleagues or to the public at large in allowing firefighters to work beyond the age of 60, he was requiring the employer to do far more than to show that the age limitation was supported in fact and reason based on the practical reality of the work-a-day world." (p. 316).

In other words, O'Leary, J.preferred the definition of bona fide in the North Bay case. This definition is consistent with the Hadley decision and the U.S. decision in Hodgson v. Greyhound. That is, any evidence that will show a "minimal increase in risk of harm" will be sufficient to discharge the employer's burden of proof when the job is one where an employee's incapacity may expose himself or others to risk. However, Mr. Justice O'Leary was willing to permit as sufficient evidence what the Board was not, that is, the deputy fire chief's "impressions" that the age

limitation was erected for safety purposes. That evidence was no different in kind, though, than the evidence presented by the experienced firefighters in the North Bay case, that age 60 was an appropriate "round-off" figure for a safe retirement policy.[1]

The final Ontario case on this matter is that of Hawkes v. Brown's Ornamental Iron Works of Belleville Ltd. (December 12, 1977). There, the Board of Inquiry (D.A. Soberman) stated:

> "...[I]t seems clearly established that the subsection [s. 4(1)(6)] may only be used to justify discrimination based on age when the respondent has satisfied the Board that there are sound reasons for the qualification." (p. 17).

Professor Soberman found that the Browns' reasons could not be "sound" since they brought forward no evidence which might have shown that the job couldn't have been performed by men or women over the age of 50.

In Canadian Human Rights Commission v. Voyageur Colonial Ltd. (December 1, 1980) a complaint was lodged against the respondent based on its policy of refusing employment as bus drivers to applicants over the age of 40. The respondent contended that the age limitation was based on a bona fide occupational qualification.

Interestingly, the company did not state that the age qualification was necessary to ensure the physical suitability of candidates. Rather,

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1. The Divisional Court decision was affirmed on appeal to the Court of Appeal but leave to appeal has been given to the Supreme Court of Canada.

its position was that new drivers would be placed in low seniority positions which inherently give rise to occupational stress. Such stress could more adequately be borne by drivers under age 40, in the estimation of the respondent.

Since tests were administered to all potential drivers for physical capacity, the age limit could not have been based on the relative performance abilities of over-40 drivers.

The Tribunal (R.D. Abbott) heard evidence that low-seniority drivers were put on call, often under adverse weather conditions and on an unpredictable schedule. Evidence of a medical practitioner was to the effect that no reliable test of ability to bear stress could be administered to applicants. As such, an age limitation would be justifiable in that people, by middle age (40 - 65), tend to react more adversely to stress than younger people. This opinion was verified by a psychologist testifying at the hearing.

Mr. Abbott adopted the test of "bona fide" put forward by Professor MacKay in the Cosgrove case, and found that the employment practice of the respondent was indeed bona fide.

He went on to consider the test in the U.S. case of Hodgson v. Greyhound. According to Hodgson, if the respondents' business involved the safe transportation of passengers, it need only show that a "minimal increase in risk of harm" would result if the age limitation were not imposed. The Tribunal found that Voyageur had satisfied that onus, and as such, the age limitation

ought to stand.

To sum up, there are certain principles that can be derived from these Canadian cases. The factors that are of most significance in determining whether there is a bona fide occupational qualification, as articulated in the Derkson and Little cases, are: 1) the nature of the job, and 2) the type of evidence available.

The determination will vary according to the weight attributable to each of these factors. Thus, where the job is hazardous, an arbitrary age limitation may be tolerated if it is supported "in fact and reason"; scientific data is not necessary: North Bay; Hall and Gray. However, if medical tests are readily available, they may go to show that an age limitation is unnecessary: Little. Where no element of risk is involved, merely the ability of the employee to carry out his or her functions, then "convincing evidence" or "sound reasons" must be brought forward to show that age was a reliable indicator of capacity: Derkson; Hawkes. The ancillary requirement is that the age limitation was imposed "honestly" or sincerely": North Bay; ie. it must not merely exist to avoid the provisions of human rights legislation.

With respect to the exception of a "bona fide retirement plan", such a plan must exist as a regime for the allocation of benefits for an employee, not merely as a uniform mandatory retirement policy: Derkson.

In these matters one may once again turn to recent U.S. decisions which have dealt with the same exceptions to a finding of age discrimination.

A leading U.S. case which was referred to by the Ontario Board of Inquiry in the Hadley v. Mississauga case, is Hodgson v. Greyhound Lines, Inc. (1974) 499 F. 2d 859. (USCA). There, the respondent company argued that its policy of hiring, as bus drivers, only persons under age 35 constituted a bona fide occupational qualification. The decision is significant in terms of its consideration of both the nature of the job, and the type of evidence available.

The court heard evidence from experienced transportation officials who substantiated the respondent's claim that the age limitation was bona fide, but Swygert, C.J. held that evidence not to be sufficient:

> "The testimony of these officials, although persuasive in view of their accumulated experience in the transportation industry, is not of itself sufficient to establish a bona fide occupational qualification. In our view we find more compelling Greyhound's evidence relating to: the rigors of the extra-board work assignments; the degenerative physical and sensory changes in a human being brought on by the aging process which begins in the late thirties in the life of a person; and the statistical evidence reflecting, among other things, that Greyhound's safest driver is one who has sixteen to twenty years of experience with Greyhound which could never be attained in hiring an applicant forty years of age or over." (p. 363).

Thus, where statistical and medical evidence was available, the opinions of experienced officials would not have been sufficient evidence to establish a bona fide occupational qualification. This scientific evidence, once brought forward, showed the Court that it would not be possible or practical to detect all of the degenerative changes that accompanied advancing age, and as such, the age limitation was reasonable.

Considering the nature of the job, Swygert C.J. stated:

> "...[A] public transportation carrier, such as Greyhound, entrusted with the lives and well-being of passengers, must continually strive to employ the most highly qualified persons available for the position of inter-city bus driver for the paramount goal of a bus driver is safety. Due to such compelling concerns for safety, it is not necessary that Greyhound show that all or substantially all bus driver applicants over forty could not perform safely ... Greyhound need only demonstrate, however, a minimal increase in harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice." (p. 863).

Substantially the same result was found in a case involving the mandatory retirement of firemen. (Aaron v. David (1976) 414 F. Supp. 453). There, Eisele, C.J. put the matter in strong terms:

> "It is apparent that the quantum of the showing required of the employer is inversely proportional to the degree and unavoidability of the risk to the public or fellow employees inherent in the requirements and duties of the particular job. Stated another way, where the degree of such risks is high and methods of avoiding same (alternative to the method of a mandatory retirement age) are inadequate or unsure, then the more arbitrary may be the fixing of the mandatory retirement age. But at no point will the law permit, within the age bracket designated by the statute, the fixing of a mandatory retirement age based entirely on hunch, intuition, or stereotyping, ie., without any empirical justification." (p. 461).

The court then went on to find that since there was no evidence that substantial risk would result if the age limitation was eliminated, the restriction was not a bona fide occupational qualification. The Greyhound decision was distinguished in that there, evidence of risk was adduced and the deterioration was not measurable. Here, evidence of risk was absent, and it was found that periodic medical examinations would adequately reveal deterioration in employees' capacities.

These decisions seem to concur in approach with the Canadian decisions. However, one wonders if the evidence accepted in the Hall and Gray and North Bay cases, as given by the experienced firemen, would have been sufficient in the U.S. to establish a bona fide occupational qualification, given the decisions in Hodgson and Aaron. The burden of proof on the employer seems to be more demanding, at least where scientific evidence is obtainable, to the extent that the opinions of witnesses are not given as much weight as more concrete, objective data.

The Board of Inquiry decision in Hall and Gray is more consistent with these U.S. decisions, in that there, the "impressionistic" evidence of the deputy fire chief was held not to be sufficient to establish a bona fide occupational qualification. However, the Board's decision was overturned by the Ontario Divisional Court: (1980) 26 OR. (2d) 308.

The Aaron decision parallels that in Little v. St. John in that it was held that where medical evidence is readily available to test the capacity of employees accurately, an age limitation should not restrict those employees arbitrarily.

With respect to a bona fide retirement plan (ADEA 29 USCA s. 623 (f) (2)), courts in the U.S. have interpreted the exception strictly. In a case where an employee was dismissed at age 55 as part of an austerity program, the U.S. District Court held that even though the program was bona fide and not a subterfuge to escape the statute, the employer could not administer

the program in a discriminatory way. (Hannan v. Chrysler Motors Corp. (1978) 443 F. Supp. 802). It was found that the program required employees age 55 and older to retire early, whereas younger employees were laid off in anticipation of being recalled. Thus, there being no other factor but age in consideration, the employer had discriminated on the basis of age. Another case though, where other factors were found, yielded a different result: (Thompson v. Chrysler (1978) 569 F. 2d 989).

The requirement in the U.S. statute that the retirement plan not exist as a subterfuge to evade the Act, is similar to Professor Makay's interpretation in the North Bay case, that "bona fide" connotes "honesty" and "sincerity".

To summarize the interpretation of exception clauses as they relate to age discrimination, one can say that an occupational qualification will likely be held to be bona fide if the job involved is hazardous; (for example, a fireman: (North Bay; Hall and Gray) so long as some evidence of increased risk with age is shown. (Hadley). If the available evidence shows that individual medical testing of employees' capacities is impractical, inconclusive, or impossible, an age limitation may be necessary, and bona fide. (Little).

The U. S. decisions follow a similar approach, except that they are less willing to accept the opinions of experienced officials as sufficient evidence that an age limitation is necessary: Hodgson; Aaron.

The exception of a bona fide retirement plan has been held to refer to a regime of employee benefits, not merely to a uniform retirement policy:

Derkson. In the U.S. a bona fide retirement plan is not an absolute exception if it is administered in a discriminatory way: Hannan.

Economic Factors

One final issue is to be considered to complete this review of the law of age discrimination. That is, of what importance are economic factors that may restrict the opportunities of an employee?

The issue was addressed in the U.S. case of Marshall v. Arlene Knitwear, Inc. 454 F. Supp. 715 (1978). In that case, a 62-year-old designer was dismissed and the court found that the reason for dismissal was not "age" per se, but rather was an economic reason directly related to age. Because of seniority, the complainant had a higher salary than any of the other designers. Also, she was dismissed before her pension benefits vested, so the employer was able to reduce the amount of its contribution to the plan. Neaker, J. held:

> "The evidence compels the conclusion that the savings in salary and the unpaid pension benefits accruing to defendants as a result of Feitis' discharge were the controlling economic factors behind her termination. Since such economic factors are directly related to age, ... reliance on them to discharge Feitis constitutes age discrimination." (p. 730).

This issue has not arisen for consideration in the Canadian cases, though it was mentioned with respect to economic factors influencing employers' hiring policies by the Board of Inquiry in the New Brunswick case of Little v. St. John Shipbuilding and Drydock Co. Ltd. January 15, 1980:

> "Generally with respect to the hiring of individuals, an employer is free to pick the individual whom it considers is best qualified to perform the job. The fact that the person is younger or older than another individual who was not hired does not amount to age discrimination. Problems involving age discrimination may arise with respect to hiring policies, however, where the job requires that an individual receive a substantial amount of on-the-job training. Unless such an employee stays in the job for a long period of time, the employer will be unable to recoup the investment it has made in training that employee." (p. 16)

In a B.C. case, (Burns v. P.I.A.B. et al April 20, 1977), the complainant was an apprentice plumber who was dismissed when it was discovered that he did not comply with the age standards of the Apprentice Board (i.e. between 18 and

25 years). The reason for the establishment of these standards was:

> "...(I)n respect of a particular apprentice, it would have a greater expectation of recovering its share of his training costs if he were younger and likely to pay dues over a longer period of time." (p. 11)

In deciding if this reason was sufficient to permit a defence of "reasonable cause" for the Apprenticeship Board, the Board of Inquiry held:

> "It is therefore our conclusion that on the evidence placed before us at this hearing, the Complainant was, by the refusal to enroll him in the training programme of the P.I.A.B. on the ground that he was more than 25 years old, and his resulting inability to comply with one of the conditions of employment stipulated in the collective agreement between the employers and the union, discriminated against without reasonable cause in respect of his qualification, ... his occupation and employment."

The Apprenticeship Board, though, had not adduced evidence to show that the economic reasons for the standards were, in fact, valid ones. Thus, it is possible that if the Board had shown that it would, indeed, suffer economic loss by not adhering to the age limits, reasonable cause may have been found.

A similar U.S. decision considered the ability of an Apprenticeship Council to prevent the employment of an apprentice on the grounds that he was 43 yeard of age. (Judson v. Apprenticeship and Training Council (1972) Or- App., 495 P. 2d. 291). The applicable Oregon statute (ORS 659. 024 (4)) permitted employers to consider the apprentice's ability to complete his or her training, and the length of time employed after training, nevertheless the Council itself was not permitted to erect maximum age limits for potential apprentices.

Thus, economic factors that are directly related to age may constitute grounds for age discrimination: Marshall v. Arlene Knitwear. Likewise, economically motivated age limits may not give rise to an exception of "reasonable cause", at least not unless it can be shown that indeed, economic loss will result if the limitations are withdrawn: Burns. Such limitations imposed by an Apprenticeship Council have been held to violate human rights legislation in Oregon: Judson.

In a recent federal human rights tribunal case, Kenneth Arnison v. Pacific Pilotage Authority (July 28, 1980), the complainant's name was removed from an eligibility list for employment as a pilot when he turned age 50. According to the regulations under the Pilotage Act s.c. 1970-71-72, c. 52, applicants for licenses must be between ages 23 and 50 years.

The Tribunal, Mr. R. G. Herbert, found that the age limit did not satisfy s. 14(2) of the Human Rights Act as a bona fide qualification. Pilots were required to complete an apprenticeship period and satisfy medical and technical standards during which their abilities could be accurately tested.

The Tribunal also considered the economic factors as an issue. If the complainant were granted a licence at age 52, and became fully qualified after three years' experience at age 55, then there would remain only ten years of active employment until retirement at age 65. Mr. Herbert did not consider this situation to give rise to a bona fide occupational qualification:

> "It might, for example, be possible to regard a minimum of 5 years fully qualified availability for service prior to retirement as a basis for fixing an upper age limit on eligibility and be regarded as a bona fide occupational qualification."

That is, ten years' service was sufficient under the circumstances.

The Tribunal went on to consider whether s. 14(b) (ii) of the Human Rights Act permitted the imposition of an upper age limit as provided by

law or under regulations made by Governor in Council. Under the Pilotage Act (s. 42), however, the Governor in Council may only prescribe "minimum qualifications respecting ... age", not a maximum age. Thus, the Governor in Council was acting beyond its authority in establishing a maximum age in the regulations, as found by the Tribunal.

The Tribunal ordered that the complainant be placed on the top of the eligibility list.

The Authority appealed the decision of the Tribunal to the Federal Court of Appeal. Le Dain, J. held that the setting of a maximum age amounted to the prescription of minimum qualifications under the Regulations pursuant to S. 42 of the Pilotage Act. As such, the Governor in Council was not acting ultra vires in setting the maximum age standard.

Thus, the Court found that the disqualification of the complainant was not a discriminatory practice. An appeal to the Supreme Court of Canada is pending.

I have discussed briefly the jurisprudence related to a possible 'economic factors" exception for the sake of completeness in my review of the law and also because of some of the evidence given in the Inquiry. For example, an internal memo of Hydro was filed, as Exhibit No. 17, which reads in part:

"Re: "Cost-Benefit Ratio" as it applies to
the Recruitment of Apprentices

It is generally accepted that apprentices do not return much in the way of useful production in the early stages of their program and that this situation improves steadily as they receive training and improve their skills.

It is further considered valid that the cost to the Corporation of apprenticeship training is in the order of $ 26,000. per person, per year. This would translate to a total net cost per person of at least $ 100,000 over the 4 and 2 year program.

It is estimated we should receive a minimum of 3 to 4 years work at the Journeyman composite trade level for each year of training to make the apprenticeship program viable. This factor coupled with the pressure of ever lowering retirement ages encourages us to look toward the 18 to 31 year old applicant as best meeting this criteria."

However, counsel for the Respondent did not advance an argument that the Respondent, Hydro, was relying upon 'age' as being a "bona fide occupational qualification" for employment as an apprentice electrician, and the defence afforded by s. 4(6) of the Code. I think counsel was quite correct in taking this position, given all the evidence, (Transcript, pp. 416, 420), the particular fact that Mr. O'Brien was only 40 years of age at the time he applied for an apprentice electrician position, with Hydro, and given the relevant law.

The Evidence as to the Factual Situation Related to the Complaint

Mr. O'Brien alleged he applied for the position of apprentice electrician in May of 1977, with Ontario Hydro, at which time he was 40 years old. Mr. O'Brien's background includes three years of electrical engineering at university, a B.A. (1969) in maths and geography from the University of Ottawa, and a certificate from Ontario Teachers' College. He has worked at different jobs at different points in his adult life, including with an insurance company, as a serviceman of business machines, as a mailman with the post office, renovating houses, as a security guard, and as a high school teacher. At a couple of points, he took time off for extensive travel.

Mr. O'Brien graduated from Teachers' College in May, 1977, but was unable to obtain a teaching job due to the then, and continuing surplus of teachers.

At the time of his seeking employment with Ontario Hydro, Mr. O'Brien was unemployed, and understandably very concerned about supporting his wife and two children (Transcript, pp. 10, 16, 17). On May 10, 1977, he went to the Ministry of Colleges and Universities, and obtained an "apprenticeship card" (Transcript,pp. 70, 71). This card, in the view of Ontario Hydro, in itself only really establishes that the cardholder has at least the equivalent of a Grade 10 education. (Transcript, p. 226). There was no evidence to suggest that the apprenticeship card had any greater significance.

Mr. O'Brien did not obtain work until the following December, as a security guard, and has continued in that employ, as a supervisor of security guards, to the time of the hearing. There was little concrete

evidence as to attempts by Mr. O'Brien to find employment between May and December, 1977. At the time of the hearing, Mr. O'Brien was in the course of completing the requirements to qualify as a real estate sales person.

Mr. O'Brien's wife had brought a newspaper advertisement (Exhibit No. 3; Toronto Star, May 21, 1977) in which Ontario Hydro was soliciting applicants for apprentice and other positions with Hydro's thermal power generating plants, (including the position of apprentice electrician) to Mr. O'Brien's attention, and he says he attended at Ontario Hydro's Toronto office and there completed and submitted an application, (Transcript, pp. 11, 43) for the position of apprentice electrician. Hydro's purpose of course, is to provide electrical energy for Ontario, and this is both an enormous, and by its nature extremely technically demanding task with maintenance of complex equipment at power generating plants being an important function. Hydro has some 27,000 employees.

There was conflict in the evidence as to whether Mr. O'Brien had actually submitted a formal application for employment, or just had a telephone conversation as to whether he might be successful if he did apply, before the complaint was filed. Mr. O'Brien was certain he had applied (Transcript, pp. 8, 42, 45). Mr. John Low, a staffing officer with Ontario Hydro who spoke with Mr. O'Brien over the telephone, about May 25, 1977, (Transcript, p. 230) was not aware of any application at the time of the conversation (Transcript, pp. 151, 218, 220, 221, 231, 232, 396) and a subsequent diligent search for an application in Ontario Hydro's records was unsuccessful. (Transcript, pp. 218, 221, 222, 228, 397, 398).

However, Mr. O'Brien's own testimony indicated that in his conversation with Mr. Low, Mr. O'Brien inferred that Mr. Low did not know of an application (Transcript, pp. 54, 55), and Mrs. O'Brien, who had also spoken with Mr. Low, was also somewhat uncertain as to whether Mr. Low knew about an application (Transcript, p. 96). Mr. Low testified he was of the understanding Mr. O'Brien had not applied, and that he invited Mr. O'Brien to apply during their telephone conversation. (Transcript, pp. 220, 231, 238). Mr. O'Brien should have known that Mr. Low did not have any personal knowledge of an application having been filed.

All applications at the time were retained for about four months, so a search for Mr. O'Brien's application some three months after (in August, 1977), Mr. O'Brien says he applied, when Hydro first learned of the complaint, should have turned up the application, if such there was (Transcript, pp. 221, 393, 394).

The complaint itself (Exhibit No. 3) does not refer to an application and in itself clearly implies there was no application filed.

However, I am prepared to accept the evidence of Mr. O'Brien on this point and find that Mr. O'Brien did complete an application for employment with Ontario Hydro, on or about the time he and Mrs. O'Brien say he did, May 24, 1977. (Transcript, p. 109). However, I find also that Mr. Low did not know about the application at any time. Ontario Hydro had a great many applications at the time, some 4435 (Transcript, pp. 150, 151; Exhibit No. 14) for the positions offered and one cannot know what happened to Mr. O'Brien's application, except to guess

that Mr. O'Brien was rejected as a suitable applicant by one of the staffing officers (other than Mr. Low); the rejected application inadvertently went astray or the application was misplaced before scrutiny, or was misfiled (perhaps it was completed incorrectly) or was destroyed before Hydro was aware of the Complaint. I have no doubt in finding that the application was not intentionally misplaced or destroyed due to Mr. O'Brien's Complaint, and in my view, the loss of the application is inconsequential to the disposition of the issues before this Inquiry. Also, my remarks about the missing application should not be construed as a slight on Hydro's filing system which is quite impressive. It may even be that somehow Mr. O'Brien, after completing the application, inadvertently did not actually transmit it to Hydro as he says he did, but misplaced it. The missing application form is inconsequential to my decision, (although it is of consequence to any consideration of remedy).

Much does turn on Mr. O'Brien's conversation with Mr. Low. The critical issue is as to whether Mr. Low, in effect, advised Mr. O'Brien that he would not be considered for employment by Ontario Hydro because of his age. I think there was some rationalizing after the fact by Mr. O'Brien, Mrs. O'Brien and Mr. Low as to what was actually said. Mr. O'Brien inferred that Mr. Low thought that Mr. O'Brien's age was a very negative factor, and a main problem in his being successful. (Transcript, pp. 14, 16, 17). In the five or ten minute conversation they had, it is also clear from Mr. O'Brien's own testimony that Mr. Low discussed many of the factors Mr. Low considered pertinent to an evaluation of an applicant -- Mr. O'Brien's background, the menial nature of the tasks performed by an apprentice electrician, the requirement of shift work and possible relocation, the importance

of staying with Hydro after completion of an apprenticeship (Hydro has a considerable investment in an apprentice through a four year apprentice program), and the low rate of pay (Transcript, pp. 56, 58, 66-68, 71, 74-80). Mr. Low testified that he was asked in the telephone conversation by Mrs. O'Brien about age and said that he assured her that Hydro has no "age restrictions" (Transcript, p. 230, 233), and denied that he told her that "apprentices were between the ages of 19 and 22", testifying that in fact apprentices are usually 18 to 28 years of age. He testified he similarly assured Mr. O'Brien that there were no age restrictions. (Transcript, pp. 234, 235).

Mr. Low testified that he did review both the nature of the position with Mr. O'Brien and Mr. O'Brien's chances of success.

> "I told him that we advertised, screened, tested, interviewed and at that point he asked what his chances of surviving at age 40 the screening process would be. I indicated to him that competition was stiff. That at age 40 I would have expected the applicant to be a journeyman electrician. That the majority of applications we received are from those in the age group of 18 to 28 who have emerged from a recognized electrical training program from a high school or community college." (Transcript, p. 236). (Emphasis added)

In his complaint, made out the day after the telephone conversation, Mr. O'Brien says that Mr. Low told him that "at 40 years, any man I hire is a journeyman, qualified electrician". (Exhibit No. 3)

However, while Mr. Low said he (Transcript, p. 235) felt Mr. O'Brien's chances of employment were slim, after speaking with him, he testified he did not communicate that conclusion to Mr. O'Brien in the telephone conversation.

"Q. Why did you not communicate that to him?

"A. I don't think it is a professional ethnic to in fact relay that information to a candidate. We don't do it during interviews, we have no reason to attempt to settle a matter of that sort in that way.

"Q. Why not?

A. It is difficult for the staffing officers, it is difficult for the candidate or applicant, it just isn't good practice. Unsuccessful candidates are notified by letter after interview.

Q. Did you tell him he would not be seriously considered?

A. No, never.

Q. Again for the reasons you have just outlined?

A. Yes.

Q. Would he have been seriously considered?

A. He would have been seriously considered but once we had examined his record he would not have been acceptable to the program.

Q. Did you know that in 1977?

A. We knew that in conversation with him that it was unlikely that he would be successful, but had not seen his paper. We don't make those decisions over the phone." (Transcript, p. 244).

Mrs. O'Brien testified that she had called Ontario Hydro after Mr. O'Brien's application was filed, to inquire about his chances, because she was "concerned about ... (his being) 40 years old" and wondered whether his age would be "a barrier". She testified Mr. Low told her there was "no hope ... (and) apprentices that we hire are between the ages of 19 and 22". (Transcript, pp. 91, 12, 93, 106, 119).

The training program for apprentice electricians is quite extensive, including four years apprenticeship, followed by a further two years at the journeyman electrician level training in instrument mechanics, so that at the end of six years the person is at the shift maintainer No. 1 level, and is a highly skilled employee (Transcript, pp. 130-132). A brief descriptive memo of Hydro's "Electrician and Instrument Mechanic Apprenticeships" was filed in evidence as Exhibit No. 7. A similar "Occupational Definition", drawn up by Hydro with the pertinent bargaining union, was filed as Exhibit No. 8. The policies for staffing Ontario Hydro, and filling vacancies, are set forth in its "Corporate Policy Statement", filed as Exhibit No. 9. The "Thermal Generating" component of Hydro would forward a "help requisition" form setting forth its need for apprentice electricians, (a sample form was filed as Exhibit No. 10) to the staffing personnel who would then place required newspaper advertisements. A document, "Conditions of Employment and Apprenticeship Training Standards Ontario Hydro - Thermal Generating Division", was filed as Exhibit No. 12. A document was prepared by Hydro for the Ontario Human Rights Commission in response to the Complaint, "Application Recruitment Screening and Interview Criteria", and filed as Exhibit No. 15. An internal memo of Hydro elaborating on the nature of the position was filed as Exhibit No. 16.

Mr. Low described the recruitment process. An application first goes to a staffing clerk, then to one of the seven staffing officers, such as Mr. Low then was, who does the initial screening. The staffing officer cannot hire, but can reject applicants at that point in the

process. The staffing officer will examine the application, reject at that point on the basis of the paper submitted, or request an interview with the applicant, perhaps accompanied with tests (Transcript, pp. 210, 330) and following the interview reject or recommend to the "training officer" who conducts a further interview (Transcript, p. 210) and makes the ultimate decision to hire or not hire. (Transcript, pp. 143-155). A "Schedule of procedures" setting forth this recruitment process was filed as Exhibit No. 11.

Some 127 offers were made in the instant recruitment situation with 109 hired (including 55 as apprentice electricians) (Exhibit No. 14; Ontario Hydro Thermal Generating Division, Thermal Training Department, Annual Report 1977; Transcript, p. 211).

A memorandum as to "'Cost Benefit Ratio' as it applies in the Recruitment of Apprentices", (Exhibit No. 17)[1] was also prepared by Hydro for the Ontario Human Rights Commission, in response to the O'Brien Complaint.

Exhibits No. 19 and 20 were memoranda developed which relate to Hydro's recruitment of apprentices for 1977. They provide data with respect to the 245 applicants who reached the second interview stage but were unsuccessful (Transcript, p. 446). They show both the average and median age for this group to be 23, and the oldest person hired to have been 28 (five at that age). However, one 35 year old person and one 37 year old person did get to the second interview stage (Exhibit No. 20, Transcript, pp. 277, 278, 445). Including those two, there were twelve

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1. Exhibit No. 17 is set forth supra, page 36a.

persons interviewed who were 30 years of age or over. A total of 109 were hired from those interviewed, including 55 apprentice electricians, all of whom were 28 years of age or younger. (Transcript, p. 444, 278). This recruitment and selection process seems generally to work well as the evidence was that there was a zero attrition rate for apprentice electricians for 1976 and 1977 (Transcript, pp. 399, 400).

Mr. Low and Mr. Vello Medri, training officer at Ontario Hydro for the thermal generation division personnel office, both testified that Ontario Hydro had in fact hired a group of persons for the position of apprentice electrician between the ages of 40 and 65, but this seems to have related to a specific, unique situation in northern Ontario when a number of people in a given community were put out of work due to the shut-down or cut-back of an industry (Transcript, pp. 434, 468). There do not appear to be any apprentice electricians over age 40 with Hydro in southern Ontario (Transcript, p. 552). However, there were, of course, relatively few applicants in that age bracket.

More generally, Mr. John Walker, Personnel Services Corordinator for Ontario Hydro, testified that a study was done to determine that the corporation in 1976 did hire 72 people between the ages of 40 and 45, 61 between the ages of 45 and 49 and 57 between the ages of 50 and 64, the total personnel hired in 1976 being some 1,400. (Transcript, pp. 453, 454, Exhibits No. 22 and No. 23).

For 1977, 469 were hired between the ages of 40 and 65, out of a total of some 2,250 (Transcript, p. 454, Exhibit No. 24).

These statistics, as well as the oral testimony of the Hydro officers who testified at the hearing, establish, in my view, that Hydro certainly has no general corporate policy of discriminating on the basis of age in its hiring of persons for employment.

However, the question before this Inquiry is whether there was discrimination on the basis of age as prohibited by the Code with respect to Mr. O'Brien's specific enquiry to be an apprentice electrician, and whether there is discrimination as to the hiring of apprentice electricians for thermal generating plants generally by those within Hydro responsible for recruiting this particular group of employees. If such is the case, then Hydro would be liable for its employees' breaches of the Code.

Mr. Low, in cross-examination, testified:

Q. How many applications have you personally received from individuals between the ages of 40 and 65?

A. I have no way of knowing.

Q. Did you receive some in 1977?

A. Again, I have no way of knowing. I would expect there would be, just as in the way we get a mix in the type of applications.

Q. Bur you have never interviewed any of them?

A. Yes, I have interviewed some but not for the apprenticeship position. We regularly interview between 40 and 65 for other positions in the corporation.

Q. But not for electricians -- apprentice electricians?

A. That's right. (Transcript, pp. 433, 434).

Mr. Medri, who made the final hiring decision for apprentice electricians, testified that he was concerned about obtaining career tradesmen, rather than someone just looking for a job, and that a stable

work record in respect of the applicant was an important indicator in this regard (Transcript, p. 476). He had given a memo (Exhibit No. 16) to Mr. Low in which he emphasized that promotion opportunities for tradesmen are limited and expressed his concern about hiring academically over-qualified people who "are not likely to be satisfied with an apprenticeship (trades type job) in the long run". (Exhibit No. 16). His primary goal was "to identify a person who has the practical abilities and the practical interests". (Transcript, p. 558).

Did Mr. Low (and Mr. Medri) regard age as an arbitrary factor in screening applicants, unless such applicants are already journeymen? Mr. Low and Mr. Medri were both very skeptical of the reasons and merits in an individual changing careers at mid-age.

Mr. Medri had no direct communication with Mr. O'Brien, but Mr. Medri's views permeated the Hydro hiring process for apprentices (as evidenced by Exhibit No.16)and these views certainly influenced Mr. Low (Transcript, pp. 255, 256, 390), and the other staffing officers as to how they considered applicants. Mr. Medri was the hiring officer.

Mr. Medri testified:

Q. One final question, you were present in the room, I believe, when I examined Mr. O'Brien and his past record?

A. That is correct.

Q. I am not going to ask you whether you would hire such an individual, but I am going to ask you this. Would you, assuming that record is correct that you heard, would you have such an individual come in for an interview?

A. No, I would reject him virtually automatically at the paper screening stage.

Q. Could you tell us why, please?

A. According to my standards, he is academically over-qualified. I have now been involved over the last seven years in hiring, I would have to hazard a guess, three or four hundred apprentices and I have never hired a person with a university degree into an apprenticeship. I have hired or been involved with out of these three or four hundred people with one degreed person, if I could explain that. This was an operator and against my advice it was the decision of thermal training centre to hire a person with a teaching degree and the intent was to have this person work in the operating field for a while and then come into the training centre and become an instructor, an assistant training officer for our operations. As a footnote, no sooner was he in the door then did he start putting in applications for other jobs.

Q. That has had an effect on you ...

A. I had made that decision long before this. I argued against hiring this sort of individual because it isn't the type of job you need a degree nor is a person with a degree likely to be satisfied on any sort of short-term or long-term or short-term basis doing this sort of work. I think a person who has gone to school and has got himself a degree has other aspirations in life other than working shift work in a steam plant.

THE CHAIRMAN: Of these three or four hundred people, apart from none of them having degrees but this one. What about having some training at university, would you hire people with that background?

THE WITNESS: There are cases of that and I go into great detail trying to find out what happened. There have been people with one or two years of engineering, they have been debarred because they failed twice. I look at their siuation, are they likely to go back and complete it? What kind of external influences are there that would suggest he is likely to go back and complete it and I make an assessment. If I am satisfied that this individual has accepted that no, he is not going to become a university graduate, I would take a chance on him.

THE CHAIRMAN: I should leave this for cross-examination, but you said that you would almost automatically reject Mr. O'Brien. He didn't have an engineering degree, he had three years, I guess he had an arts degree at that point.

THE WITNESS: Any degree.

THE CHAIRMAN: That was the point of over-qualification.

THE WITNESS: That is correct. (Transcript, pp. 474-476).

Certainly Mr. Medri was testifying from some experience and with honestly held and expressed views. One cannot deny the relevancy of these concerns or even that they might be true in a good many situations. However, he was making a generalization about applicants with a university degree that is not proven, and certainly that cannot be taken as universally true. The criticism of being "over-qualified" is an impossible and invidious one for an applicant to respond to. He has no control over such a situation. Presumably, he cannot get a job in the area for which he is qualified (teaching), obviously cannot get a position in an area for which he is underqualified, and now is precluded from obtaining a position in a trade for which he is "over-qualified". That would seem to make it impossible to find employment. Moreover, individuals have all kinds of reasons for changing jobs, perhaps to get away from undue pressure or to have a position of less responsibility, perhaps because they are 'burned-out' in their present occupation, or perhaps just because of present unemployment. Moreover, not everyone pursues a university degree just for employment purposes.

There were some positives, as well as some negatives, to consider with respect to Mr. O'Brien's application. However, he would not really receive consideration by Mr. Medri given the simple, unfortunate fact of his having a university degree. I realize the quoted testimony relates simply to a candidate's educational qualifications rather than to his age. However, considering all the evidence, I think

the same stereotypical view was present with respect to age as a criterion for apprenticeship positions.

It is true that Mr. O'Brien had never really embarked substantially into any particular career, but rather had several tentative starts. All in all, I think his stated qualifications deserved an interview, and I think Mr. Low was quite frankly telling him that there was no point in applying given his age and the fact he was not then a journeyman electrician. Mr. O'Brien had some considerable background in electrical theory, he obviously had some aptitude for the practical as evidenced by his being a renovator of houses, and he was desirous of a firm career at this point in his life given his family responsibilities and his past bad luck. He might possibly have been a 'diamond in the rough' as it were.

However, Mr. O'Brien's work history does also suggest that he might be an unstable employee, although this could really only be determined upon an interview. Perhaps the ultimate assessment of his candidacy, after an interview, would be that he is unreliable, and therefore, he should not be offered an apprentice position for this reason (as Mr. Medri suggested in his testimony, Transcript, p. 476). But it is my view, considering all the evidence that he would not have been considered on the merits by Mr. Low and Mr. Medri simply because of the fact of his age coupled with the fact that he was not an experienced journeyman.

I find, considering all the evidence, that Mr. Low did discourage Mr. O'Brien for the reason that Mr. Low and Ontario Hydro were so

skeptical of 40 year old applicants (who were not journeymen electricians) for apprenticeship positions, that there was no real point in Mr. O'Brien pursuing an application. To Mr. Low, Mr. O'Brien was not an ideal candidate on the face of it, and Hydro had a great many applications, and Mr. Low was really telling Mr. O'Brien that he had no chance, given his age coupled with the fact that Mr. O'Brien had not a work history of directly related work (i.e. Mr. O'Brien was not a journeyman electrician).

Mr. O'Brien did not, but should have followed up his enquiry, in all events. He was discouraged after his conversation with Mr. Low, but did not pursue the matter to see what had happened to the application he says he had put in, and he had no basis for presuming that Mr. Low personally had either dealt with it or would be the particular staffing officer to review it, or even knew of it. Indeed, he should have realized that Mr. Low had not any personal knowledge of the application. Mr. O'Brien did not press Mr. Low for an interview in the conversation, nor did he press Hydro after the conversation, at least prior to filing his complaint.

With respect to Mr. Low's telephone conversation with each of the O'Briens, in my view, Mr. Low did not expressly say that Ontario Hydro would refuse to employ Mr. O'Brien. Indeed, I accept his evidence that he said he told them there were no age restrictions. There was not a direct refusal to employ by Mr. Low on behalf of Hydro. If there had been such a direct refusal and it was on the basis of age, there clearly would be discrimination that is prohibited by the Code.

However, Mr. Low was discouraging to Mr. O'Brien, and obviously discouragement can, in a given factual situation, amount to an applicant

thinking that he will be refused employment if he pursues the matter. An employer might use words to the effect that an applicant can apply and no (formal) decision will be made until then, but there is really no point in applying because of the applicant's age. In such event, there would be discrimination as prohibited by the Code. In my view, considering all the evidence, that is what happened in the instant situation.

Mr. Low's words to the O'Briens were discouraging, and the primary basis for this discouragement was age-related. What Mr. Low was saying, as the staffing officer, in effect, (and Mr. Medri, as the training (hiring) officer behind him), and Hydro generally through these employees in charge of hiring, was that age is a factor considered in hiring apprentices and when an applicant is 40 years of age or so, there is great skepticism about whether he is suitable due simply to the fact of his age, (if he is not a journeyman electrician), and given the abundancy of young candidates, the 40 year old applicant has no real chance.

Let us hypothesize that a 40 year old applicant had held many jobs very briefly before applying for the apprenticeship program, and had not demonstrated any knowledge or interest in electrical work prior to applying. Hydro should understandably view this record very adversely, in assessing that applicant. Hydro has a great many applicants, and it wants to make sure it obtains the best qualified in its long run interests. As counsel for Hydro argued, everyone generates "headwinds" as he or she gets older, for good or bad. However, on the other hand, if an applicant to be an electrician apprentice had spent the previous

twenty years in the military, and had learned a directly related trade, (i.e. was a journeyman) I think Hydro would consider him to have an advantage for employment, as a journeyman. It is the in-between situations, of course, that are difficult and specifically the candidate who can demonstrate capability and interest , but by choice or compulsion desires a change of careers, say from being a trained teacher to being an apprentice electrician. Mr. O'Brien, at first glance (that is with knowledge of his background but in the absence of an extensive interview and testing) would fall into this category.

Any employer such as Hydro, cannot and should not ignore the past of a 40 year old applicant in assessing his or her prospects for the future. The candidate's work record (stable or unstable, related or non-related to electrical skills) interests (such as hobbies, whether they are related or not related to the electrician trade) education and aptitude will be scrutinized and are pertinent criteria in assessing the candidate's prospects.

However, Mr. Low's conversation with Mr. O'Brien was not really directed simply to determine whether Mr. O'Brien had good personal attributes (for example, was stable) and whether he had related experience. It wasn't just that Mr. Low was skeptical because Mr. O'Brien was 40 and had not worked in the related field. Once he determined Mr. O'Brien did not have related experience (was not a journeyman) Mr. Low was really saying to Mr. O'Brien that because you are 40 years of age Hydro is not seriously interested because there are too many good young applicants. I think this approach is implicitly using age as an arbitrary standard, contrary to the Code. Mr. Low considered that age had significance in determining whether a person might adapt to certain job conditions - for example, certain menial tasks, minimal responsibility,

low pay, shift work, relocation, ease in returning to classroom study, and these were the central matters Mr. Low brought up in their conversation (Transcript, pp. 58, 59, 67, 68, 69, 73, 74, 250 -254, 401-404, 428). At first glance, many people might react, because of a widely held viewpoint about age, the same way as Mr. Low. Indeed, the common perception of apprentices is that they are young. A brochure of the Ontario Ministry of Colleges and Universities , filed as Exhibit No. 4, includes the phrase "the apprenticeship system in Ontario. How it works for youth....(and) Apprentices are goal-oriented young men and women...." I have no doubt that Mr. Low was endeavouring to act honestly, conscientiously, in the best interests of Hydro and as directed by Mr. Medri. The quoted references to "young" in the government brochure are obviously simply there because most apprentices will be young in fact, and just embarking upon the beginning of a career. The typical apprentice is young. But it is an all too easy, unconsciously taken further step for our society to think they have to be young, and that youth is a prerequisite to being an apprentice. Then age becomes an arbitrary standard, and it is this arbitrary use of age as a standard for employment that is prohibited by the Code. In my view, considering all the evidence and I so find,the hiring process of Hydro for apprentice electricians, specifically Mr. Low and Mr. Medri, made this mistake.

If one reflects,how can one possibly say that simply being 40 years of age can be in any way an adverse factor in determining an individual's responsiveness and adaptability to the aspects of the job that Mr. Low discussed with Mr. O'Brien. The matter really turns simply upon the particular individual, not his age.

Mr. Low was not simply pointing out to Mr. O'Brien the negatives that many 40 year olds with a university background (or younger individuals with no university training) might perceive in looking at the apprentice electrician position although he rationalized on this basis after-the-fact. Rather, he was saying to Mr. O'Brien that Hydro perceives 40 year olds generally to have that perception and therefore are unsatisfactory applicants for apprentice positions. Mr. Low and Mr. Medri do, I am sure, a very good job generally in recruiting for Hydro. They want to get good people and they have a great many applicants. They are consciencious employees.

However, considering all the evidence, I find that they employ age as an arbitrary factor in the recruitment of apprentices. If Mr. O'Brien had been, say, 22 years of age with his background in electrical theory, he would, I am sure, have most certainly been encouraged by Mr. Low, and one way or the other it w ould have been realized at a later point his application had gone astray, he would have filed a new one and been a prime candidate at least to the stage of the first interview and testing. But his age was the significant factor that resulted in his being discouraged by Mr. Low. I really do not think it was his varied background that mattered. If Mr. O'Brien had, say, worked for the post office as a mailman for eighteen years or so after dropping out of university, (i.e. shown he was undoubtedly steady and reliable in his work record) I do not think he would have received any serious consideration by Mr. Low and Mr. Medri. They wanted, quite understandably and quite correctly, good applicants for the position of apprentice. However, they could find enough good young applicants who met their criteria, that they were prepared to arbitrarily exclude a 40 year old applicant.

His only chance for employment would be as a journeyman electrician, not as an apprentice, and he was not, of course, a journeyman electrician.

CONCLUSION:

For the reasons discussed, I find that Ontario Hydro discriminated against the Complainant on the basis of age, contrary to s. 4(1)(b) of the Code.

In my view, considering all the evidence, this is not a case where the Complainant should receive any award for damages. There was no concrete evidence as to the Complaint seeking other positions, and notwithstanding that I have found discrimination contrary to the Code by Hydro, I think the Complainant should have pursued his interest in employment with Hydro by pressing Hydro for further consideration. I do not think the simple fact of the five or ten minute private telephone conversation, coupled with a missing application, should be a basis for damages. Mr. O'Brien knew or should have known, that Mr. Low did not personally know anything about his application having been filed, and it was Mr. O'Brien's incomplete Complaint, which made no reference to an application having been filed, that led Hydro to believe, until this Inquiry convened, that a formal application for employment was never received by Hydro. If an application had been seen by Mr. Low, in the absence of any conversation with Mr. O'Brien, I think it would have been rejected given the view of Mr. Low about the simple, arbitrary, fact of Mr. O'Brien's age with no directly related work experience. However, if Mr. Low had ever known there was an application filed, that factor, coupled with the telephone conversation and the Complaint, would have resulted in an interview and I think at that point Mr. O'Brien would have had a further assessment of his candidacy. It would have been better for Hydro to

have someone other than Mr. Low interview Mr. O'Brien, given the history of the matter, so that fairness was seen to be done, although, I do think that Mr. Low, given his undoubted reflection upon the hiring practices as a result of the history of this Complaint and of this Inquiry, will objectively assess candidates for the position of apprentice in the future without employing age as an arbitrary factor. He and Mr. Medri are, as I have emphasized, capable, conscientious employees who want to obtain the best qualified candidates as apprentice electricians for Hydro. This must be emphasized. However, in doing so, they implicitly have been using "age" as an arbitrary factor in assessing candidates for the apprentice position. I am certain they do so only because they are zealous in considering factors they personally think proper and necessary to their assessment of candidates. The point is, they consider "age" in itself as an adverse factor in the consideration of applicants for the position of apprentice, unconsciously holding and reflecting a value that is, I think, fairly widely held in our society, but which, in the enlightened public policy as enunciated by the provisions of the Code, results in an unlawful act when acted upon such that it is a factor in refusing to employ a person. I appreciate that just as it is difficult to purge old values, in a society of rapidly changing values, it is similarly difficult to purge their unrealized influence in affecting decision-making actions in the recruitment and employment process. Such values often remain at the unconcious level for many who do their very best at the conscious level to make proper, and in their opinion, best-possible decisions. Mr. Low and Mr. Medri neither intended to treat candidates unfairly, nor did they act in the employment decision-making process of Hydro with the belief that they were acting contrary to the Code.

The Complainant did suffer some anguish, but it was not substantial. To some extent, the Complainant's position was exaggerated by himself and his wife. As well, there was absolutely no malice on the part of Mr. Low. In fact, he was trying to be kind and helpful, as admitted by the Complainant, and he certainly was polite and frank. Finally, it is certainly questionable as to whether Mr. O'Brien would ultimately have been hired by Hydro in all events if his candidacy had been considered objectively and fairly on the merits, and not arbitrarily rejected because of his age. Exercising my discretion and considering all the evidence, I am firmly of the view that this is a case where damages should not be awarded, and I have no doubt in coming to this conclusion.

O R D E R

For the foregoing reasons, this Board of Inquiry orders the following:

1. It is ordered that the Respondent, Ontario Hydro, cease to contravene section 4 of the Ontario Human Rights Code, and that Ontario Hydro shall henceforth employ persons for positions of apprentices on a basis whereby age by itself is not held to be an adverse factor in considering applicants for employment (except where age by itself is a bona fide occupational qualification and requirement for any such positions of employment).

2. It is ordered that the Respondent shall forward to the Complainant within ten (10) days of the making of this Order, an application form to be an apprentice electrician, and the Complainant shall have twenty (20) days after the mailing of such application form to complete it and submit it to the Respondent, and if the Respondent receives such completed application form within such stipulated time period, the Respondent shall thereupon have two senior employees of the Corporation (other than Mr. Low and Mr. Medri) interview Mr. O'Brien and assess his candidacy for the position, ignoring his age, and the results of such interviews and assessments on the merits, and recommendations, shall be forwarded to Mr. Medri's superior who shall make the decision whether or not to offer the Complainant a position of apprentice electrician with the Respondent. Such decision, together with the reasons therefor, shall

be communicated in writing to the Complainant and the Ontario Human Rights Commission within thirty (30) days of receipt by Hydro of the submitted application.

DATED at Toronto this 22nd day of June, 1981.

Peter A. Cumming
Board of Inquiry